ESTATES BY ENTIRETY—BEIHL vs. MARTIN

The Supreme Court of Pennsylvania recently decided, in the case of *Beihl* vs. *Martin*, 236 Pa. 519, that where both tenants of an estate by entirety join in a deed conveying the property, the purchaser takes a good title and this title is not impaired by a prior judgment obtained against one of the tenants.

The facts of the case sufficient for our purposes were these: A property was acquired by deed of conveyance to a husband and wife. The husband, Ernest H. Beihl, was adjudged a bankrupt by the United States District Court for the Eastern District of Pennsylvania on the second of July, 1909. On the same day, several judgments were entered against the husband by creditors who subsequently filed their respective claims with the referee appointed in the bankruptcy proceedings.

The wife did not join in or consent to the bankruptcy proceedings. In September, 1911, Beihl and his wife entered into an agreement with William J. Martin to convey to him the property in question "clear of any and all judgments and defects of every kind and particularly clear of any contingent claim of ownership or interest which might or could be enforced against the said premises." The question was whether or not under these facts a proper deed from Beihl and his wife to Martin would convey such title to the premises as was stipulated for in the agreement. The Court held that it would. Counsel for Martin contended that such a conveyance could not be made in view of the previously obtained judgments and in support of this contention cited the case of *Fleek* vs. *Zilhaver*, 117 Pa. 213.

In that case, husband and wife held title to a property. Judgments were obtained against the husband and properly indexed in the judgment index; subsequently, the husband and wife both joined in the mortgage on the same property. Later, the wife died and an execution was issued upon the judgments that had been obtained against the husband and the land sold thereunder. A *scire facias* on the mortgage followed and the party holding title from the sheriff was served as *terre* tenant. The question was

the efficiency of the sheriff's sale under the judgment to pass title, and this depended on the priority of the one lien over the other. The Court held that the purchaser at the sheriff's sale on the judgments took a valid title clear of the lien of the mortgage. In reaching this conclusion, the court said:

"As against the wife, the mortgage was undoubtedly the first and indeed the only lien. As against the husband, the judgment was the first lien and the mortgage the second, simply because the judgment was obtained before the mortgage was given. Had the wife survived, the mortgage would certainly have had the precedence to the exclusion of the judgment, *because the estate bound by the lien of the judgment* was defeasible by the death of the husband before the wife. For the same reason, if the husband survived the wife, the estate of the latter was divested and the mortgage only became operative against the husband because he had joined in its execution. But as to him, it was not the first lien, he having become subject to a judgment at a time anterior to the giving of the mortgage."

In distinguishing this case from the case before them the Supreme Court in the Beihl case said:

"This case stands as an authority with respect to what it expressly rules, *viz.*: That the interest of husband and wife where they hold by entireties may be subject of lien, and that upon the death of either the lien against the survivor may be enforced. It is to be observed that it does not rule that there can be a severance in ownership in any other way than by the death of one or other of the parties or by voluntary alienation by both."

The conclusion reached settles to a considerable extent the uncertainty created by the *Fleek* vs. *Zilhaver* decision. It is submitted, however, that its value is somewhat impaired as a result of the position which the court was forced to take in its attempt to distinguish the two cases. As a consequence, the court has added fuel to the fire which it should have extinguished.

In defining this estate, Blackstone says: "If an estate in fee be given to a man and his wife, they are neither proper joint tenants nor tenants in common: *For husband and wife being considered as one person in law*, they cannot take an estate by moieties, but both are seized of the entirety, *per tout et non per my* (by all and not by half); the consequence of which is that neither husband nor wife can dispose of any part without the consent of the other,

but the whole must remain to the survivor."[1] And, according to Preston's definition, tenancy by entireties "is where husband and wife take an estate to themselves jointly by grant or devise, or on limitation of use made to them during coverture, or by grant, etc., which is *in fieri* (in being) at the time of the marriage and completed by livery of seisin or attornment during coverture.[2]"

And where an estate is granted in fee to a husband and wife and a third person, the husband and wife take only one moiety between them and the third person takes the other moiety.[3]

And this is true, notwithstanding that the estate is granted to be held in common *not* as joint tenants.[4]

This estate has several peculiarities. The husband has the entire use and the wife has the entire use, for there are no moieties between husband and wife. Hence, it is termed tenancy by entireties[5] and in the excellent notes to Dean Lewis' Edition of Blackstone, in the Second Volume, page 102, it is said:

"The husband cannot forfeit or alien so as to sever the tenancy. As the husband and wife cannot sue each other (except in a few instances by legislative sanction), they are not compellable to make partition."

The legal fiction of unity of husband and wife has been strictly adhered to in Pennsylvania. Not only is it true in this Commonwealth that a conveyance or devise, which as to unmarried persons would make them joint tenants or tenants in common, will as to married persons create an estate by entireties,[6] but this is so, even if the conveyance or devise is expressly made to the husband and wife "as tenants in common and not as joint tenants."[7]

These authorities establish beyond doubt the fact that the reason for the rule that a conveyance to husband and wife, which as to unmarried persons would make them tenants in common, creates an estate by entirety, is founded on the legal action of the unity of husband and wife. The opinions in our own courts are

[1] 2 Blackstone,* Page 182.
[2] 1 Preston on Estates, 131.
[3] Johnson vs. Hart, 6 W. and S., 319 (Pa.).
[4] Barker vs. Harris, 15 Wend. 615 (N. Y.).
[5] C. J. Montague in Plowden, 58.
[6] Simon's Estate, 4 Clark 204 (1847, Pa.).
[7] Stuckey vs. Keefe, 26 Pa., 397; McCurdy vs. Canning, 64 Pa., 39.

based on this theory. In the case of *Stuckey* vs. *Keefe's* executors, the court expressly approved Chancellor Kent's statement[8] that the reason for the rule is founded not on any supposed intention of the parties to the conveyance, but on the unity of husband and wife, and as a necessary result of that unity they cannot take by moieties.

This discussion of the incidents of the estate indicates the extent of each tenant's interest therein. But the real question is the extent of the power of each tenant to deal individually with that interest, and bind the other tenant's interest. It is certainly obvious that the very foundation of the estate, the "unity" of the parties, requires "unity" of action to bind the *estate*. On this point, all authorities agree. The difference occurs in the answer to the question "what does a judgment creditor of either tenant acquire *qua* the estate?"

The question has been answered by the Supreme Court of Pennsylvania in three different cases involving as many situations. In chronological order the facts were as follows:

I. A judgment was entered against the husband; subsequently, husband and wife joined in mortgaging the estate. *After the death* of the wife, execution was issued on the judgment against the husband and the estate sold.

II. A municipal lien was filed against the wife and *during* the life of both tenants execution was issued thereunder and the estate sold.

III. A judgment was entered against the husband; subsequently, husband and wife covenanted to convey the entire estate clear of any encumbrances to a third person.

In the first case, as has been shown earlier, the court said that the judgment creditor of the husband may issue execution on such judgment and the purchaser would take a title unencumbered by the mortgage. On a writ of error, the case was taken to the Supreme Court on the ground, *inter alia*, that the trial judge had erroneously charged the jury. The charge is worthy of attention. In part, the trial judge said: "Although owing an undivided one half by virtue of his, the husband's tenancy *as a joint tenant*, upon the death of his wife, the whole property became vested in him

[8] 2 Kent's Com. 132; 4 Kent's Com. 362.

and he was the mortgagor, but, there being an open judgment entered against him prior to that time, the title he acquired by the death of his wife inures to the benefit of his judgment creditors."[9] The trial judge then ordered a verdict for the purchaser at sheriff's sale on the judgment. The judgment was affirmed by the Supreme Court. While it is true that joint tenants own an undivided *one-half interest*, that is precisely wherein a joint tenancy differs from a tenancy by the entirety. It was upon this distinction that the Act of 1812, abolishing joint tenancies, was held not to apply to tenancies by entirety. The husband and wife in this case were tenants by the entirety and as such were seized of the *whole*, and the husband did *not own* "an undivided one-half by virtue of his tenancy as a joint tenant." If the husband's interest was an undivided half, then we would have no quarrel with the proposition that a judgment against the husband would be a lien on his interest, but the difficulty arises from the fact that his interest is an undivided interest in the *whole* and that of his co-tenant a like interest. "The estate of joint tenants is a unit made up of divisible parts; that of husband and wife is also a unit, but it is made up of indivisible parts."[10] In the light of this definition the lower court erred in that part of the charge which has been quoted, but the Supreme Court with no reference to this manifest error affirmed the judgment in a very brief opinion. While it is true that the court neither adopts nor rejects the view taken by the trial judge, the brevity of the opinion compels the conclusion that the decision was influenced by it. Mr. Justice Green said:

"It was the kind of an estate which was bound by the lien of the mortgage given by Mary Holcomb; and *it was the same kind* of an estate *which was bound* by the lien of the judgment against her husband."[11]

In the second case, Mr. Chief Justice Mitchell said:

"It appears by the case stated, that the husband and wife were registered owners by entireties of the lot in question when the municipal lien was filed against the wife alone. . . . . .

[9] Fleek vs. Zilhaver, *supra*, at page 215.
[10] Beihl vs. Martin, *supra*, at page 523.
[11] Fleek vs. Zilhaver, 117 Pa., at page 218.

As against the husband therefore, the lien was a nullity and the sale under it passed no title."[12]

Our third case was the case of *Beihl* vs. *Martin*, cited at the outset of this paper. The court held that the voluntary transfer by the husband and wife gave to the transferee a marketable title free from the lien of any judgments against the husband. After citing the case of *Fleek* vs. *Zilhaver*, *supra*, with approval, the court, in distinguishing the cases, said:

"This case (*Fleek* vs. *Zilhaver*) stands as an authority with respect to what it expressly rules. . . . . It is to be observed that it does not rule that there can be a severance in the ownership in any other way than by the death of one or other of the parties, or by voluntary alienation by both." In other words, the severance of the estate occurs only upon the happening of either one or the other of the two contingencies pointed out; death of either one of the joint owners or voluntary alienation by both."

That the facts were different in each case is not denied, but that only one underlying principle was involved is beyond question. The three cases agree in one point, namely: In each, a judgment was entered against either one or the other of the two owners. The difference arose out of the subsequent disposition of the estate. As a result of these cases, these propositions are established.

I. If the tenant against whom the judgment is entered survives the other, the judgment has priority over a mortgage executed by both tenants subsequent to the entry of the judgment.

II. If, however, the judgment creditor issues execution on his judgment in the lifetime of both tenants a sale thereunder passes no title to the purchaser.

III. Where both tenants voluntarily execute a deed of conveyance to a third party, such purchaser takes a clear title, and the judgment creditor, though prior in point of time, has no rights as against the estate in the hands of the purchaser.

All three decisions involve the same principle and can be sustained only upon the position, first, that the judgment creditor of the one tenant has by virtue of his judgment a lien on the estate, and second, that this lien, though attaching to the estate,

[12] Allen vs. Lyons, 216 Pa., 604.

remains dormant, not alone dependent on the death of the other tenant, but living only in the hope that there will be no united voluntary action on the part of both tenants to cut off its peaceful existence.

With all due respect to the authorities quoted, it is submitted that either the judgment in these cases is a lien, or it is *not* a lien. If it *is* a lien, it should be given the same force and effect as any other lien entered against the absolute owner of an estate. In the latter case, execution may be issued at *any* time, and priority between lien holders depends upon exactly what the word indicates. Responsibility for this new kind of a lien evolved by the court cannot be placed upon the peculiar nature of the estate in question. According to the earliest definitions of the rights of the co-owners, neither one of the tenants can interfere with the proper enjoyment of the estate by the other, without the consent and joinder of that other, and the rights of judgment creditors can rise no higher than those of their debtors. The right to mortgage the estate with the consent of the husband is as much a part of the enjoyment of the estate by the wife as is the right of the husband to sell the estate with the consent of the wife. To give a judgment creditor of one tenant a greater right than the holder of a mortgage from both is an interference with this enjoyment irre pective of the time of the execution of the mortgage.

In theory, a mortgage is a conveyance of the title to the estate, and if the conveyance by deed passes the title clear of the lien of a judgment, the conveyance by mortgage should have the same effect. It is for this reason that we take issue with the court in the case of *Fleek* vs. *Zilhaver*, and with the Supreme Court in the case of *Beihl* vs. *Martin*, when it bases its distinction between the two cases upon the fact that in the one case the form of alienation was a mortgage, and in the other a deed.

The correctness of this position taken by our courts is questioned upon the additional ground spoken of before. They hold the right to sell to be one of the privileges possessed by the co-owners and not the right to mortgage. We have said that, theoretically, a mortgage is a conveyance of the title; in practice in our state it is not. Let us, therefore, deal practically with the question: What Title Company will insure the mortgage on such

an estate with a prior judgment on record against one of the co-tenants in view of the decisions in *Fleek* vs. *Zilhaver* and *Beihl* vs. *Martin*? And how many investors will accept a mortgage which a title insurance company will not insure? Certainly, not very many.

One reason advanced for the position taken by the court in these cases is that the surviving tenant acquires no new estate upon the death of his co-tenant, and that the judgment is a lien on the same estate. While this is true insofar as quantity is concerned, it is not true in respect to the quality. He is now *sole owner* in fee *of the estate*, whereas formerly, to put it freely, he was only co-tenant in fee. As co-tenant, the interest of the other tenant had to be considered, as survivor he need consult the wishes of no one. This being so, it is submitted that the survivor does acquire something new, he acquires something which at once inures to the benefit of his judgment creditors, but it comes to the survivor burdened with such liabilities as were imposed on it by the joint action of the co-tenants in the life time of both.

Let us take the opinion of Mr. Justice Stewart in our principal case[13] for a moment: "The rights of the parties are fixed by the deed of conveyance to them, and by that instrument each took an entirety made up of indivisible parts. Any alienation by one, the other not consenting, *of any interest* whatever in the estate, if allowed, would be an abridgement *pro tanto* of the rights of the other. By their joint act they admittedly have the right to sell and dispose of the whole estate; by their joint act they may strip the estate of its attributes and create a wholly different estate in themselves; but neither can divest himself or herself of any part without in some way infringing upon the rights of the other. The wife has the right to initiate as well as the husband. Suppose she desires to sell the land—a right which is hers—and the husband consents, *what does his consent amount to if he has parted with his expectancy of ownership to a stranger? Such circumstances would operate to deny to the wife the enjoyment of an inseparable incident of ownership, the right of alienation.*"

We assent most emphatically to this part of the opinion and respectfully submit that in the light of this argument the court

[13] Stuckey vs. Keefe, *supra*

has changed its position taken in the case of *Fleek* vs. *Zilhaver*. As we have already said, the cases, though involving different facts, give rise to the same principle; that being so, we ask again: Is not the right to mortgage as much one of the rights of initiation which the wife has, as is the right to alienate? Both privileges involve the right to enjoy and differ only in the degree of the enjoyment. We submit further that so long as the case of *Fleek* vs. *Zilhaver* represents the law of our state, this right of the wife to mortgage the estate cannot be exercised if a judgment has been entered against her husband, as has been pointed out heretofore. So far as the right of the wife to "initiate" is concerned, it amounts to one and the same thing whether the husband sells his right of expectancy or permits a judgment to be entered against him. Since the court admits that the wife has the right to initiate, we may now ask this second question: Suppose she desire to mortgage the land—a right which is hers—and the husband consent, what does his consent amount to if he has parted with so much of his expectancy as will be necessary to pay a judgment entered against him? Such circumstance would operate to deny to the wife the enjoyment of an inseparable incident of ownership, *the right to mortgage*. Surely the only difference here between the judgment and the sale of the expectancy is one of degree alone.

In an earlier part of the opinion,[14] Mr. Justice Stewart says:

"We start in the discussion with an admission which the case of *Fleek* vs. *Zilhaver*, *supra*, compels, that the judgments here obtained against the husband were liens, but upon what? Certainly not upon the entirety that was in the husband, for the entirety of estate was in the wife equally with the husband,and being in its nature indivisible, it would follow necessarily that any encumbrance upon the estate of the one would rest upon that of the other, a result which, of course, could not be justified or allowed except as the inherent attributes of the estate are to be wholly disregarded."

Surely, if the act of one tenant alone is not a lien *upon the entirety*, but merely upon the expectancy of survivorship, this lien must be postponed to a valid lien created jointly by both tenants *upon the estate itself*. The court in *Fleek* vs. *Zilhaver*, as has been pointed

[14] Beihl vs. Martin, *supra*, at page 527.

out, held otherwise, and the opinion filed by Mr. Justice Stewart in the case of *Beihl* vs. *Martin*, upholds this decision. If the court in that case was right in the view taken as shown by our quotations from the opinion (*supra*) and we submit that it is, the decision in *Fleek* vs. *Zilhaver* is not, and rather than attempt to distinguish it, the court's error should have been acknowledged. The failure to do this, as we have already said, increased the existing confusion. It will be recalled that we quoted from the opinion of the court this statement:

"It is to be observed that it (*Fleek* vs. *Zilhaver*) does not rule that there can be a severance of the ownership in *any* other way than by the death of one or other of the parties, or by voluntary alienation by both."

We ask, therefore, what result will be reached if, upon the same state of facts as those in the case of *Fleek* vs. *Zilhaver*, the mortgagee issues a *scire facias sur* mortgage *in the life time of both tenants?* In view of this opinion and the distinction it makes bewteen the two cases, will the court hold that the purchaser at such sale takes clear of the encumbrance of the judgment? On principle this would be true, but if the court follows its decision logically, it would be compelled to hold otherwise, for according to the position taken a mortgage is not a conveyance, and the opinion in *Beihl* vs. *Martin* confines a severance to a *voluntary* conveyance or death of one tenant.

Have the married women's acts had any effect on this venerable estate? In the case of *Stuckey* vs. *Keefe*, *supra*, which arose before these acts, a conveyance made to husband and wife "as tenants in common," and not as joint tenants, was held to constitute the grantees tenants by entireties, upon the ground that the estate by entireties was created by a rule of law irrespective of the intention of the parties; and from the preceding cases it must be admitted that the presumption of unity, between husband and wife, which arises from their marriage precludes the consideration of the intention of the parties. It would seem, therefore, that in order to change the rule the legal presumption must be changed. The real question, therefore, is, has this presumption been changed by the married women's acts?

In cases following *Stuckey* vs. *Keefe*, it has been held that estates by entireties have not been abolished by the Act of 1848, or the Separate Property Act of 1887, and that such estate would be created by the same conveyance as at common law notwithstanding these acts.[15] In *Bambery's Estate, supra*, the court said: "It has been contended, and in some jurisdictions held, that the legislation which secured to the wife the enjoyment of her separate estate is destructive of the legal unity of husband and wife upon which tenancy by entireties depends. But the better view is that such tenancies are not destroyed or impaired by it."

In the case of *Diver* vs. *Diver, supra*, Strong, J., in delivering the opinion of the court said: "To hold it (Act of April 11, 1848) as operating upon a deed of land to a wife making such deed assure a different estate from what it would have assured without the Act is to lose sight of the legislative purpose. . . . . Were we to do so it would become, in many cases, a means of divesting her of her property instead of an instrument of protection. . . . . We hold then that no such effect is to be given to the Act of 1848, or any of its cognate Acts. . . . . The legal unity of husband and wife still exists. . . . . ."

In an earlier case, the court went further and said that notwithstanding the passage of the Married Women's Act of 1848, a conveyance to a husband and wife "To have and to hold the said lot or piece of ground as tenants in common *and not* as joint tenants" created an estate by entireties.[16] Yet, in a case decided in 1901, Mr. Justice Mitchell said: "But in no case that has been brought to our attention was there anything to show an express intent of the parties to take otherwise than according to the legal presumption. The incapacity of husband and wife to take as joint tenants or tenants in common was a strict logical deduction from their entire unity at common law. When the statutes in relation to Married Women severed this unity as to property, the reason of the rule no longer existed. There never was any incapacity to hold as tenants in common if the conveyance were made to them before marriage. 2 Cruise 494; 2 Plowden 483, cited in *Stuckey* vs. *Keefe, supra*. And it may be considered as still

[15] Diver vs. Diver, 56 Pa. 106; Bambery's Estate, 156 Pa. 628.
[16] McCurdy vs. Canning, 64 Pa. 39 (1870).

an open question whether they may not, now, since the acts referred to, take as well as hold in common, if that be the actual intent, notwithstanding, the legal presumption to the contrary."[17]

In the case of *Beihl* vs. *Martin*, *supra*, Mr. Chief Justice Stewart in the opening paragraph of his opinion said: "It may be that because of modern innovations on the common law respecting the property rights of married women, the venerable estate known as estates by entireties has outlived the purpose of its creation and is out of harmony with present conditions. However this may be, if change is desired, it must come through legislative acts and not through judicial construction. This estate is too well established and too well defined to be subject to judicial impairment."

These cases compel the conclusion that the determination of our question depends upon the legislative intention as expressed in the married women's acts and the result of that intention. One conclusion must be admitted; if the purpose of the acts was as Strong, J., said in *Diver* vs. *Diver*, *supra*, to *protect* the property of the married woman—then the *intention* of the parties as expressed in the conveyance must govern; so that if at the present time a conveyance is made to the husband and wife as tenants in common and *not* as joint tenants, they should take as tenants in common, for surely the wife who is only granted the interest of one of two tenants in common can not ask to be granted, or protected in a different right.

It is submitted, however, that the married women's act went further than to protect the property rights of married women—it extends those rights. The rights of a married woman to deal with or hold property granted to her were few indeed at common law. The Act of June 8, 1893, P. L. 344, Section 1 provides that hereafter: "A married woman shall have the same right and power as an unmarried person to acquire, own, possess, control, use, lease, sell or otherwise dispose of any property of any kind—real, personal or mixed . . . . . and may exercise the said right, and power in the same manner and to the same extent as an unmarried person. . . . . ." Surely this must be considered an enabling act. The rights enumerated in these acts

[17] Merritt vs. Whitlock, 200 Pa., at page 55.

are additional rights granted and not merely existing rights protected. The question is not, therefore, whether "because of modern innovations the venerable estate known as estates by entireties has outlived its purpose," but it is whether the reason for the creation of that estate exists or not. Can it be said in the light of this legislation that husband and wife in the eyes of the law today are "one"? The argument advanced by Chief Justice Mitchell, that if change is desired it must come through legislative acts and not through judicial construction, while it rightfully recognized the line between legislative and judicial functions, nevertheless begs the question. If at common law it were held to be a crime for a married woman to hold property and an act were passed providing that thereafter a married woman might acquire, hold, own, and possess property in the same manner as a woman unmarried, the question would be whether the act had abolished the crime, and it is submitted that that was the question before the court in the case of *Beihl* vs. *Martin, supra.*

Many jurisdictions have taken the view that after the enactment of the married women's acts, the unity of husband and wife was destroyed. In Illinois, it was said that by the Act of 1861 conferring upon married women the right to acquire property and hold and enjoy the same free from the husband's control, the rule that a conveyance to husband and wife made them tenants by entirety ceases to exist,[18] and the same effect has been attributed to these acts upon this estate in Alabama, and other of our states have followed the same line of reasoning.[19]

In England, Parliament passed what is known as the Married Woman's Property Act, 45 and 46 Vict., Clause 75. Since then it has been held that the old rule of law that husband and wife were for most purposes one person and so that under a gift by will to a husband and wife and a third person, a husband and wife took only one moiety between them and the third person took the other moiety is not now applicable to such a gift under a will that came into operation since the commencement of that act.[20]

[18] Mitchell vs. Care, 133 Ill. 68.

[19] Wothall vs. Gorce, 36 Ala. 728 (1896).

[20] *In re* March—Mauder vs. Harris, 24 Ch. D. 222.

It is submitted that from these authorities there is much to be said in favor of the view that since the passage of the married women's act, the unity of husband and wife no longer exists, and that, if tenancies by the entirety are not abolished, at least the creation of such an estate has become dependent upon the intention of the parties.

Harry Shapiro.

Philadelphia, April 14, 1913.